

STATE OF MICHIGAN
COURT OF APPEALS

FARM BUREAU GENERAL INSURANCE
COMPANY,

UNPUBLISHED
May 31, 2005

Plaintiff-Appellant,

and

FARM BUREAU MUTUAL INSURANCE
COMPANY,¹

Plaintiff,

v

JEREMY PALMATEER, RENEE PALMATEER,
and HAROLD PALMATEER,

No. 253290
St. Clair Circuit Court
LC No. 03-002185-CK

Defendants-Appellees.

Before: O'Connell, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Plaintiff Farm Bureau General Insurance Company appeals by right the order of the circuit court granting defendants summary disposition. Plaintiff requested a declaration that its homeowners (dwelling under construction) insurance policy issued to Jeremy Palmateer and Renee Palmateer ("the Palmateers" or Jeremy) did not provide coverage for an accident in which Harold Palmateer, Jeremy's father, was injured while helping construct the insured premises. We reverse and remand for further proceedings.

The present action arose from an underlying premises liability lawsuit between Harold and Jeremy. Harold sued Jeremy for injuries he sustained in a January 2002 fall while assisting Jeremy build his future residence. At the time Harold fell, plaintiff insured the Palmateers' with a policy that identified the residence under construction as the covered dwelling. In light of the

¹ Farm Bureau Mutual Insurance Company, which insured Harold Palmateer under a "farmowners" policy, was granted summary disposition and is not a party to this appeal.

suit against him, Jeremy tendered his defense to plaintiff. Plaintiff denied coverage because its policy excluded personal liability for bodily injury to an insured, which was defined to include the named insured, i.e., the Palmateers, and “residents of your household who are . . . your relatives.” Because Harold is a relative of the Palmateers and all Palmateers were residents of the same household at all pertinent times, Plaintiff contends that its policy does not afford Jeremy coverage on Harold’s underlying premises liability claim.

We review de novo a trial court’s ruling on a motion for summary disposition. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Where, as here, the trial court grants a motion for summary disposition pursuant to both MCR 2.116(C)(8) and (C)(10), but it is clear that the court looked beyond the pleadings, we will treat the motion as having been granted under (C)(10), which “tests whether there is factual support for a claim.” *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). Under MCR 2.116(C)(10), a party may move for dismissal of a claim based on the ground that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues, and support its position with affidavits, depositions, admissions, or documentary evidence. MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The court reviewing the motion must consider all of the documentary evidence in the light most favorable to the nonmoving party. *Id.*; MCR 2.116(G)(4).

If the moving party carries its initial burden, the party opposing the motion must then demonstrate with admissible evidence that a genuine and material issue of disputed fact exists, otherwise summary disposition is properly granted. MCR 2.116(G)(4); *Smith v Globe Life Ins Co*, 460 Mich 446, 455, n 2; 597 NW2d 28 (1999). We evaluate the trial court’s decision on petitioner’s motion “by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules.” *Maiden, supra* at 121.

We recognize that the purpose of a motion for summary disposition is to avoid extended discovery and an evidentiary hearing when a case can be quickly resolved as a matter of law. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2003). Nevertheless, “a motion under MCR 2.116(C)(10) is generally premature if discovery has not closed, unless there is no fair likelihood that further discovery would yield support for the nonmoving party’s position.” *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002). See also *VanVorous v Burmeister*, 262 Mich App 467, 476-477; 687 NW2d 132 (2004). Here, we find the trial court acted prematurely by granting judgment to defendants before defendants had even filed an answer to plaintiff’s complaint, and there had been no discovery specific to the issue in the instant case.

Preliminarily, we note that the issue presented in this case is not how to interpret plaintiff’s insurance policy. Rather, the issue is whether the Palmateers and Harold were residents of the same household or whether they maintained two separate households under the same roof, as the trial court determined. We observe that “the construction and interpretation of an insurance contract is a question of law for a court.” *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). Further, whether the language used in a contract is ambiguous, thus requiring resolution by the factfinder, is also a question of law for the court.

Id.; *Klapp v United Ins Group Agency, Inc.*, 468 Mich 459, 469; 663 NW2d 447 (2003). But a contract provision is not ambiguous because a term or word is undefined; rather, the terms and words must be construed in accordance with their common meanings. *Henderson, supra* at 354. Provided it is not contrary to law, a clear and unambiguous exclusion in an insurance contract must be enforced as written. *Farm Bureau Mutual Insurance Co v Nikkel*, 460 Mich 558, 566, 568; 596 NW2d 915 (1999); *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 418; 668 NW2d 199 (2003).

Here, the trial court correctly recognized that the exclusion at issue is unambiguous, using terms that have commonly understood meanings. *Id.* at 563, n 6; *Thomas v Vigilant*, 156 Mich App 280, 282-283; 401 NW2d 351 (1986). In *Thomas*, this Court opined regarding the term “household” in a similar homeowner’s policy definition of “insured” as follows:

Black’s Law Dictionary (rev 4th ed), p 873, defines “household” as: “a family living together . . . [those] who dwell under the same roof and compose a family.” *Webster’s Third New International Dictionary* (1971) defines “household” as: “[those] who dwell under the same roof and compose a family; a domestic establishment; specifically, a social unit comprised of those living together in the same dwelling place.” *The American Heritage Dictionary of the English Language* (1976) defines “household” as: “[a] domestic establishment including the members of a family and others living under the same roof.” The commonly understood meaning of the word “household” is a family unit living under the same roof.

Likewise, in *Meridian Mutual Ins Co v Hunt*, 168 Mich App 672; 425 NW2d 111 (1988), this Court interpreting a homeowners policy that excluded “bodily injury to you or a family member residing in your household” found that “household” refers “to a distinct type of living arrangement in the sense of a social unit.” *Id.* at 680-681.

Although the policy exclusion at issue in this case is unambiguous, the application of an unambiguous provision under any given set of facts and circumstances is not always easy. *Henderson, supra* at 357. Determining membership in a household for the purpose of determining insurance coverage is generally a question of fact dependent on consideration of all of the facts and circumstances of the particular case. *Fowler v Airborne Freight Corp*, 254 Mich App 362, 364; 656 NW2d 856 (2002); *Montgomery v Hawkeye Security Ins Co*, 52 Mich App 457, 461; 217 NW2d 449 (1974). In this regard, the trial court erred by finding that factors discussed in *Workman v DAIE*, 404 Mich 477, 495-497; 274 NW2d 373 (1979) are not appropriately considered in making such a determination.²

² We acknowledge that *Workman* was decided in the context of the no-fault insurance act. But because the *Workman* Court could find no case on point interpreting the statutory language in issue (“domiciled in the same household”), the Court relied on “a body of law which deals with the question of whether a person is a ‘resident’ of an insured’s ‘household’ under particular insurance policies.” *Workman, supra* at 495. The Court believed that body of law was
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As another preliminary matter, we find that the trial court also erred in applying the rule of contra proferentem, citing *Auto-Owners Ins Co v Churchman*, 440 Mich 560; 489 NW2d 431 (1992), for the proposition that “exclusionary clauses in insurance policies are to be strictly construed against the insurer and in favor of providing coverage.” Our Supreme Court has recently explained that this rule of contract interpretation only applies if an ambiguity exists, and then only as a last resort if other extrinsic evidence cannot resolve the ambiguity. *Klapp, supra*, at 470-471, 474. See also *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 60-61; 664 NW2d 776 (2003) (the rule of reasonable expectations is the same as the rule of construing against the drafter and its application is limited to ambiguous contracts). As noted above, the contract exclusion at issue is not ambiguous; a question of fact simply exists as to whether the exclusion applies under the facts and circumstances of this case. “That a question of fact may exist regarding the applicability of the policy language to specific circumstances does not render the policy language ambiguous.” *Nikkel, supra* at 570. Because the policy exclusion at issue is not ambiguous, the rule of contra proferentem is not relevant to the factual determination of its application.

After plaintiff filed its action for declaratory relief, defendants, instead of filing an answer, moved for summary disposition. Defendants argued that although the Palmateers and Harold were related and lived together in the same house, they maintained separate “households.” Defendants supported their motion with excerpts from the depositions of Harold and Jeremy taken in the underlying premises liability case and an affidavit of Harold Palmateer. Plaintiff argued that motion was premature because discovery specific to the coverage issue had not occurred. In the alternative, plaintiff argued it was entitled to summary disposition based on the deposition testimony of Harold and Jeremy in the underlying action. That testimony showed the Palmateers and Harold had lived in the same house for 2½ to 3 years before and for a year after the accident. Plaintiff also submitted the Palmateers’ application for the insurance at issue that listed the same address and telephone number as Harold’s, just as they were listed in a local telephone directory.

The parties argued their respective positions to the court on December 15, 2003, and the trial court issued its opinion in favor of defendants on December 17, 2003. The trial court’s order implementing its opinion and granting summary disposition to defendants was entered on January 4, 2004. In its opinion, the trial court ruled that defendant’s alternative argument for further discovery was simply a stop-loss argument in the event the court disagreed with its position, and that the parties were really in agreement that the trial court had sufficient information to render judgment as a matter of law.

Based on the information before it, the trial court “found” that Harold was not member of the Palmateers’ household. Although it was undisputed that all Palmateers lived in the same

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“analytically applicable” to the issue presented. *Id.* The factors the Court discussed were compiled from numerous decisions taken from various legal contexts, including homeowner’s insurance. *Id.* at 496-497. Accordingly, we believe that the *Workman* factors are not limited in applicability to the no-fault setting.

house during the relevant time period, the court nevertheless concluded the Palmateers and Harold did not live together as a “social unit,” citing *Hunt, supra* at 681. In reaching this conclusion, the trial court relied primarily on the affidavit of Harold that the Palmateers resided on the second floor, bought their own groceries, ate separate meals, did their own laundry, and had a separate phone line for which they paid. The trial court also reasoned that the Palmateers were only residing with Harold temporarily while their new home was being built. The trial court further reasoned that the fact that “Farm Bureau accepted payment from both Harold and the Palmateers to insure their separate households” supported the court’s determination that two separate households existed.³

Although believing the *Workman* case to be inapposite, the trial court nonetheless applied its four factors: (1) the subjective or declared intent of a person to remain indefinitely in a household, (2) the formality of the relationship between the person and the other members of the household, (3) whether the place where the person lives is in the same house, within the same curtilage, or upon the same premises as the insured, and (4) the existence of another place of lodging for the person in question. *Workman, supra* at 496-497; *Fowler, supra* at 364. The court relied on Harold’s affidavit and inferred that the “relationship was also relatively formal while [the Palmateers and Harold] were living together.” Although the court recognized that *Workman* factor three favored plaintiff, it observed that no single factor is controlling and found that the Palmateers and Harold “were clearly maintaining separate households.”

We conclude that the trial court erred in granting a summary disposition in favor of defendants by making a finding of material fact about which plaintiff had a genuine dispute. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Summary disposition may only be granted under MCR 2.116(C)(10) when giving the non-moving party the benefit of the doubt, the evidence is such that reasonable minds could not disagree. *Henderson, supra* at 360-361; *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). As discussed *supra*, plaintiff does not lose the benefit of this rule because an unambiguous insurance policy exclusion is at issue. Plaintiff clearly raised a disputed issue of material fact with evidence that all the Palmateers lived in the same residence for 2½ to 3 years before issuance of the insurance policy, and all Palmateers continued to reside in Harold’s home during the term of the 12-month policy. That the Palmateers intended to move into their new dwelling when it was completed is not in and of itself dispositive of the ultimate issue of fact. Moreover, under *Workman*, there are factual scenarios wherein two generations could reside together as one household even while occupying separate physical spaces. In sum, because the trial court made its findings of fact primarily on the basis of an ex-parte affidavit before any specific discovery had been conducted in the declaratory judgment action on the material fact at issue, the trial court clearly erred.

³ The two policies did not insure “households.” Rather, Farm Bureau issued two separate policies: the Farm Bureau General policy insured a dwelling under construction where people did not reside and the Farm Bureau Mutual policy insured a working farm where people lived, naming Jeremy and Renee and Harold Palmateer respectively.

VanVorous, supra at 476-477; *Townsend, supra* at 140.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Jane E. Markey

/s/ Michael J. Talbot